BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHIRLEY RUSSELL	)	
Claimant	)	
VS.	)	
	)	Docket No. 201,706
MCI BUSINESS SERVICES	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the Preliminary Hearing Order of Administrative Law Judge Nelsonna Potts Barnes entered in this proceeding on June 20, 1995.

ISSUES

The Administrative Law Judge denied claimant's request for benefits because she found claimant failed to prove either she gave notice of accident within ten (10) days as required by statute or that she had shown just cause for failing to provide notice within that ten (10) day period. Claimant requested this review. The issue now before the Appeals Board is whether claimant provided timely notice of accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a review of the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the finding of the Administrative Law Judge that claimant failed to provide timely notice of accident should be reversed.

Claimant worked for the respondent for fourteen (14) months as a telemarketer before terminating her employment on March 30, 1995. During her last several months at work, claimant noticed intermittent pain in her hands. Claimant mentioned the symptoms to her co-workers.

On May 1, 1995, approximately five (5) weeks after terminating her employment, claimant became concerned when she noticed the pain in her hands had become constant although claimant had not worked since leaving respondent's employ. On May 4, 1995 claimant contacted respondent and advised the Human Resources Department of her condition and inquired of the necessary course of action to obtain medical treatment. The following day claimant saw a chiropractor and on May 18, 1995 saw orthopedic specialist James Gluck, M.D., who diagnosed possible mild bilateral carpal tunnel syndrome.

The Appeals Board finds claimant's date of accident is her last day of work on March 30, 1995. The Appeals Board also finds claimant had just cause for failing to provide notice of accident within ten (10) days of that date. This Board finds claimant did not realize she had sustained an injury at work and did not know until after seeing Dr. Gluck that she had symptoms of carpal tunnel syndrome. Also, claimant testified she had no prior workers compensation claim, was never told what to do if she experienced pain while at work, and never saw any signs posted on respondent's premises that contained information about what she should do if injured at work. Because claimant has established just cause, the period for providing notice was extended seventy-five (75) days from the date of accident and was, therefore, timely. See K.S.A. 44-520.

Although not intended as an exhaustive list, some of the factors to consider in determining whether just cause exists are:

(1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
(2) Whether the employee is aware they have sustained either an accident or an injury on the job.
(3) The nature and history of claimant's symptoms.
(4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether the respondent has posted notice as required by K.A.R. 51-13-1.

When just cause is an issue, the above factors should be considered but each case must be determined on its own facts. The Appeals Board finds persuasive evidence establishing just cause for failing to report the accident within the ten (10) day period contained in K.S.A. 44-520.

The majority disagrees with the dissent that has been filed in this case. The dissent makes an analogy between the present notice statute with that of the written claim statute which does not contain the element of “just cause.” See K.S.A. 44-520 and K.S.A. 44-520a. There is no question the Legislature intended the new notice statute to place a strict requirement on the employee to notify the employer of a work-related accident. However, there is also no question that the Legislature intended, when it inserted “just cause” in the statute, that if the employee established a reasonable and appropriate explanation for failure to give notice of an accident within ten (10) days that the employee would not be barred from obtaining workers compensation benefits. If the Legislature intended the new notice statute be strictly construed in order to defeat an injured employee's right to workers compensation benefits, the Legislature would not have included “just cause” in its provisions.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge Nelsonna Potts Barnes entered in

this proceeding on June 20, 1995, should be, and hereby is, reversed; that claimant has provided timely notice of accident as required by K.S.A. 44-520; and that this case is remanded to the Administrative Law Judge for additional proceedings and findings consistent with this Order. The Appeals Board does not retain jurisdiction over this proceeding.

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I must respectfully dissent from the opinion of the majority in this matter. K.S.A. 44-520 requires notice of an accident stating the time and place and particulars thereof within ten (10) days after the date of accident. In this instance, claimant noted intermittent pain in her hands for several months before terminating her employment March 30, 1995. Notice was not provided to the employer for five (5) weeks after the date of her termination of employment, well outside the ten (10) day limit contained in K.S.A. 44-520.

The Board's analysis that claimant did not realize she had sustained an injury until after seeing a doctor again dilutes the Legislative mandate that "just cause" be shown before notice can be accepted if it falls between eleven (11) and seventy-five (75) days from the date of accident. The Board appears to again allude to some necessity for a specific diagnosis before notice is owed to the respondent. K.S.A. 44-520 clearly mandates notice within ten (10) days of the "accident."

In this instance, the fact that claimant communicated to her fellow employees over a several month period, regarding intermittent pain in her hands, indicates claimant had a significantly more accurate assessment of her situation than she is given credit by the Appeals Board.

This Board Member also finds it significant that, of the four (4) elements listed in the majority opinion to consider in determining whether just cause exists, claimant was clearly aware that she had sustained some type of physical problem and, being aware of her own ongoing symptomatology, discussed it with her co-workers.

The Supreme Court considered a similar argument regarding the written claim requirements of K.S.A. 44-520a in the case of Rutledge v. Sandlin, 181 Kan. 369, 310 P.2d 950 (1957). In Rutledge the claimant slipped and fell striking his ribs, knocking the breath out of him. He felt no pain and was aware of no injury at the time of the accident which occurred on August 18, 1954. In May 1955, claimant began to feel pain and discomfort, but continued to work until August 1955. In August 1955, claimant was diagnosed with a sarcoma to the eighth (8th) rib which was malignant. Claimant provided written claim to the respondent on November 17, 1955 which, at the time, was outside of the one hundred twenty (120) day limit from the date of accident. The trial court allowed written claim was properly and timely submitted as it occurred within one hundred twenty (120) days from the providing of hospital and medical services by the respondent. The trial court went on to conclude since the injury was neither apparent nor discoverable until some nine (9) months after the accident, the statutory period for filing a demand did not commence to run until after the furnishing of medical and hospital services by the respondent. The Supreme Court in reversing the trial court found:

> "We have been unable to find any justification for the trial court's finding that the legislature intended the 120 days to commence to run from the time the injury could be or was discovered, . . . we must hold the written claim must be filed within 120 days from the date of the accident irrespective of when the resulting injury is discovered."

The Rutledge analogy is very consistent with this matter. Regardless of when claimant's condition is diagnosed the ten (10) day time limit commences running from the date of accident, not from the date of diagnosis or discovery.

The diluted definition of just cause being created by the majority of the Appeals Board defeats the Legislative intent contained in K.S.A. 44-520. It is now possible for any claimant, even when noticing ongoing symptomatology, to delay notifying the employer for up to seventy-five (75) days of their problems, simply by stating they were not aware of the diagnosis and were not aware that they had sustained an injury. This Board Member respectfully dissents from the majority opinion's ongoing attempt to eliminate notice under K.S.A. 44-520 as a viable issue in Kansas workers compensation litigation.

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BOARD MEMBER

c: Michael L. Snider, Wichita, Kansas
Stephen Jones, Wichita, Kansas
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director